IN THE SUPREME COURT OF THE STATE OF NEBRASKA

Nos. S-08-001182, S-08-001183

IN RE INTEREST OF ELIAS L.,

A Child Under 18 Years Old

AND

IN RE INTEREST OF EVELYN M.,

A Child Under 18 Years Old

APPEAL FROM THE COUNTY COURT OF
DAKOTA COUNTY, NEBRASKA SITTING AS A JUVENILE COURT

Honorable Kurt T. Rager, County Judge

BRIEF OF AMICI CURIAE

RECEIVED

MAR 26 2009

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

Sarah Helvey, #23410
LaShawn Young, #20900
Nebraska Appleseed
Center for Law in the Public Interest
941 "O" Street, Suite 920
Lincoln, NE 68508
shelvey@neappleseed.org
lyoung@neappleseed.org

Attorneys for Amicus Curiae
Nebraska Appleseed Center for Law in the Public Interest

Mark C. Tilden, CO Bar #020005
admitted pro hac vice
Native American Rights Fund
1506 Broadway
Boulder, CO 80302-6296
mctilden@narf.org

Attorney for Amici Curiae
National Indian Child Welfare Association, Indian Center, Inc., the Santee Sioux Nation, the Oglala Sioux Tribe, the Osage Nation, the Sac and Fox Tribe of the Mississippi in Iowa, the Spirit Lake Tribe of North Dakota, and the Rosebud Sioux Tribe

Rosalyn J. Koob, #22294
1128 Heideman Law Firm, LLP
Historic 4th Street
Sioux City, IA 51101
roz.koob@heidmanlaw.com

Attorney for Amicus Curiae
Winnebago Tribe of Nebraska

Ben Thompson, #22025
Thompson Law Office, LLC
2425 S. 144th Street, Suite 120
Omaha, NE 68144
ben@thompson.law.pro

Attorney for Amicus Curiae
Omaha Tribe of Nebraska

Jennifer Gaughan, #21768
Legal Aid of Nebraska
1904 Farnam Street, Suite 500
Omaha, NE 68102-1969
jgaughan@legalaidofnebraska.com

Attorney for Amicus Curiae
Legal Aid of Nebraska

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

BACKGROUND 2

I. CONGRESS ENACTED ICWA IN RESPONSE TO A CRISIS OF MASSIVE PROPORTIONS THAT CONTINUES TODAY 2

ARGUMENT 4

II. THE PLAIN LANGUAGE AND CONGRESSIONAL INTENT OF THE ICWA MANDATES THE UNCONDITIONAL RIGHT OF TRIBES TO INTERVENE AND PARTICIPATE IN ICWA PROCEEDINGS 4

III. REQUIRING TRIBES TO BE REPRESENTED BY AN ATTORNEY TO INTERVENE OR PARTICIPATE IN STATE ICWA PROCEEDINGS WOULD HAVE A SIGNIFICANT, DETRIMENTAL EFFECT ON TRIBES, INCLUDING AN INFRINGEMENT ON TRIBAL SOVEREIGNTY AND A CONGRAVENTION OF THE ICWA 11

CONCLUSION 14

AFFIDAVIT OF SERVICE 16

TABLE OF AUTHORITIES

Cases

Antoine v. Washington, 420 U.S. 194 (1975) 9

Bryan v. Itasca County, 426 U.S. 373 (1976) 9

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 13

Fisher v. Dist. Court, 424 U.S. 382 (1976) 13

In re Angus, 655 P.2d 208 (Or. Ct. App. 1982), *cert. denied*, 464 U.S. 830 (1983) 9

In re Halloway, 732 P.2d 962 (Utah 1986) 8

In re Interest of C.W., 239 Neb. 817, 479 N.W.2d 105 (1992) 7

In re Interest of Destiny A. et al., 274 Neb. 713, 742 N.W.2d 758 (2008) 6

In re Interest of Enrique P, 14 Neb. App. 453, 709 N.W.2d 676 (2006) 6, 10

In re Interest of Walter W., 14 Neb. App. 891, 719 N.W.2d 304 (2006) 5, 7

In re K.H., 981 P.2d 1190 (Mont. 1999) 9

In re Mellinger, 672 A.2d 197 (N.J. Super. Ct. App. Div. 1996) 9

Matt v. Arnett, 412 U.S. 481 (1973) 9

McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164 (1973) 9

Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) 2

Premium Farms v. County of Holt, 263 Neb. 416, 640 N.W.2d 633 (2002) 7

State ex rel. Juvenile Dep't of Lane County v. Shuey, 850 P.2d 378 (Or. Ct. App. 1993) 6

State of Alaska, Dep't of Health & Soc. Servs. v. Native Village of Curyung, 151 P.3d 388 (Alaska 2006) 12

State v. Lona F. (In re Joshua M.)., 251 Neb. 614, 558 N.W.2d 548 (1997) 7

State v. Switzer (In re J.K.), 265 Neb. 253, 656 N.W.2d 253 (2003) 5

United States v. Lara, 541 U.S. 193 (2004) 13

Washington v. Confederated Bands of the Yakima Indian Nation, 439 U.S. 463 (1979) 9

Zach v. Eacker, 271 Neb. 868, 716 N.W.2d 437 (2006) 6

Statutes

25 U.S.C. § 1901 .... 2, 7

25 U.S.C. § 1901(4) 2

25 U.S.C. § 1902 7

25 U.S.C. § 1911(c) 5, 7, 8, 9

25 U.S.C. § 1931(a)(3) 6, 11

25 U.S.C. §§ 1901–1963 6

25 U.S.C. §§ 1911-1917 5

25 U.S.C. §§ 450 *et seq.* 6, 11

25 U.S.C. § 1901 1

25 U.S.C. § 1911 .... 1, 4

Neb. Rev. Stat. § 43-1504 .... 5, 10

Neb. Rev. Stat. § 43-1504(3) 5

Neb. Rev. Stat. § 7-101 .... 1, 4

Neb. Rev. Stat. §§ 43-1501–1516 5

Omaha Tribal Code § 12-3-3 13

Omaha Tribal Code § 12-3-6 13

Ponca Tribe of Neb. Code § 3-3-2 13

Ponca Tribe of Neb. Code § 3-3-5 13

Regulations

25 C.F.R. § 89.40 .... 6, 11

25 C.F.R. § 89.41 .... 6, 11

Other Authorities

3 Norman J. Singer, *Sutherland Statutory Construction,* § 60:1 (6th ed. 2001) 9

B.J. Jones, Mark Tilden & Kelly Gaines-Stoner, *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children* (2nd ed. 2008) 12

Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67583 (Nov. 26, 1979) 9

H.R. Rep. No. 85-1386 (1978) 2, 8

Honorable Richard D. Sievers and Honorable Teresa K. Luther, *Report of the Nebraska Supreme Court Committee on Pro Se Litigation* (November 22, 2002) 14

National Indian Child Welfare Assoc., *Technical Assistance,* http://www.nicwa.org/technical_assistance/ 14

National Indian Child Welfare Assoc., *Training,* http://www.nicwa.org/training/ 14

National Indian Child Welfare Assoc., *Tribal Child Welfare Worker Certification,* http://www.nicwa.org/certification/ 14

Native American Rights Fund, *A Practical Guide to the Indian Child Welfare Act* (2007) 10

Nebraska Department of Health and Human Services, *Statewide Assessment* (2008) 4

Nebraska Indian Child Welfare Act: Floor Debate on LB 225, 89th Nebraska Legislature 1847-1848 (1985) 8

Nebraska Indian Child Welfare Act: Hearing on LB 255 Before the Committee on the Judiciary, 89th Nebraska Legislature 90-114 (1985) 8

Nebraska Judicial Branch, *Self Help,* http://www.supremecourt.ne.gov/self-help/ 14

Pew Charitable Trusts' Kids Are Waiting Campaign and NICWA, *Time for Reform: A Matter of Justice for American Indian and Alaskan Native Children* (2007) 2

Resolution of the Santee Sioux Nation #2003-24 13

S. Rep. 95-597 (1997) 8

SDCL 28-8A-33 (2005) 12

U.S. Department of Health and Human Services, Administration for Children and Families, *Nebraska Child and Family Services Review, Final Report* (September 2002) 3

U.S. Government Accounting Office (GAO), *Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States*, GAO-05-290 (April 2005) 3

STATEMENT OF INTEREST

On February 24, 2009, the National Indian Child Welfare Association ("NICWA"), the Osage Nation, and the Nebraska ICWA ("Indian Child Welfare Act") Coalition, consisting of the Winnebago Tribe of Nebraska, the Santee Sioux Nation, the Omaha Tribe of Nebraska, the Oglala Sioux Tribe, the Indian Center, Inc., the Nebraska Appleseed Center for Law in the Public Interest ("Nebraska Appleseed") and Legal Aid of Nebraska filed a *Motion for Leave to File An Amicus Curiae Brief.* This Court sustained the motion on February 27, 2009.

Amici curiae refer the Court to the Statements of Interest set forth in the *Motion for Leave to File An Amicus Curiae Brief* at 2-6.

SUMMARY OF ARGUMENT

This case concerns whether the Indian Child Welfare Act (the "ICWA" or "Act") preempts any Nebraska law purportedly requiring a federally recognized tribe to obtain legal counsel to intervene or participate in an ICWA proceeding in Nebraska state courts. The Act is intended to protect "the continued existence and integrity of Indian tribes" and to "recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. §1901. The unconditional right of a tribe to intervene and participate in an ICWA case in state court is therefore critical to the accomplishment of the goals set forth in the Act.

Specifically, Appellant argues, *inter alia*, that 25 U.S.C. §1911 of the ICWA, which mandates that an Indian child's tribe be permitted to intervene in an ICWA proceeding, preempts Neb. Rev. Stat. § 7-101 which prohibits the unauthorized practice of law. *Amici* concur with Appellant in this argument and rely on Appellant's preemption analysis, and further elaborate on why the language of the ICWA secures the unconditional right of a tribe to intervene and

participate in an ICWA proceeding. *Amici* also argue that requiring a tribe to be represented by an attorney to intervene and participate in a state ICWA case would have a significant, detrimental effect on all tribes, including the infringement on tribal sovereignty and the contravention of the ICWA.

BACKGROUND

I. CONGRESS ENACTED ICWA IN RESPONSE TO A CRISIS OF MASSIVE PROPORTIONS THAT CONTINUES TODAY

Enacted by Congress in 1978, the Indian Child Welfare Act stemmed from a growing tribal and federal concern in the late 1960s and early 1970s that the intentional and unintentional practices of non-tribal public and private child welfare agencies led to the disproportionate, wholesale, and often unwarranted, separation of Indian children from their families. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-33 (1989). This separation usually led to the subsequent permanent placement of those children in non-Indian foster or adoptive homes and institutions. 25 U.S.C. § 1901(4). These practices eventually reached a level that caused tribes to fear for their very survival. By 1974, so many tribal children were lost to the states' foster care systems and public and private adoption agencies that the tribes' survival had become a "crisis . . . of massive proportion." H.R. Rep. No. 85-1386, at 9 (1978).

Sadly, this crisis continues, and perhaps is worse today in Nebraska than it was in the 1970s. According to a recent report from the Pew Charitable Trusts and NICWA, "[n]ationally, American Indian/Alaskan Native ("AI/AN") children are over-represented in the foster care system, at more than 1.6 times the expected level." Pew Charitable Trusts' Kids Are Waiting Campaign and NICWA, *Time for Reform: A Matter of Justice for American Indian and Alaskan Native Children*, 5 (2007), *available at* http://www.kidsarewaiting.org/tools/reports/files/0009

pdf. In Nebraska, there were 561 AI/AN children in foster care in 2005, representing nine percent of the state's foster care population. *Id.* at Appendix B. This places Nebraska as the eighth highest state in the country in terms of the percentage of children in foster care who were AI/AN and the second highest state in the country in terms of the greatest disproportionality of AI/AN children in the foster care system. *Id.* at Appendix C and D. These are startling statistics given that Indians comprise between only .04 and 1.3 percent of the Nebraska population. U.S. Government Accounting Office (GAO), *Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States*, GAO-05-290, at 12 (April 2005), *available at* http://gao.gov/cgi-bin/getrpt?GAO-05-290.

Despite the overrepresentation of Native American children in foster care in Nebraska, the system is ill-equipped to provide adequate services for these children. For example, Nebraska's noncompliance with the ICWA was documented by the U.S. Department of Health and Human Services in their 2002 (the most recently released) federal review ("Child and Family Services Review" or "CFSR") of Nebraska's child protection system. U.S. Department of Health and Human Services, Administration for Children and Families, *Nebraska Child and Family Services Review, Final Report* (September 2002), *available at* http://basis.caliber.com /cwig/ws/cwmd/docs/cb_web/SearchForm (Final Reports, Nebraska). The CFSR evaluated the state on seven different outcomes and included an assessment of ICWA-related issues. *Id.* In its evaluation of Nebraska's compliance with permanency outcomes, the CFSR reviewed the state's efforts at "preserving connections" between the child and his or her biological family and/or cultural heritage. Nearly a third of cases did not sufficiently preserve the child's family connections and cultural heritage while in foster care. *Id.* at 8, 40. This was one of many areas in which the state's child welfare system "needed improvement." *Id.* The federal review also

noted failures to provide adequate notice to Indian tribes and that "Nebraska has no written procedures for caseworkers to use in determining a child's membership or eligibility for membership in a Tribe." *Id* at 40. These are very scenarios that the ICWA was intended to reverse by allowing a tribe the unconditional right to intervene with an agent of its own choosing. While a recent report submitted by the state to the U.S. Department of Health and Human Services as part of the state's second federal review suggests that the state has made efforts to improve its compliance with ICWA, much work remains to be done, particularly in terms of recruiting Native foster homes and providing notice to tribes. Nebraska Department of Health and Human Services, *Statewide Assessment* (2008), *available at* http://www.dhhs.ne.gov /jus/cfsr/StWdAst08.pdf. With the participation of a tribe, the likelihood of the proceeding being transferred to the jurisdiction of an Indian child's tribe is significantly increased. When a case is transferred, and even when the tribe is involved in the case as an intervening party, the likelihood of the Indian child being placed with a Native family and maintaining vital cultural connections is significantly increased. This situation underscores the need to protect the best interests of Indian children to have the involvement of their tribe in their ICWA cases in order to protect and preserve their cultural connections and tribal identity.

ARGUMENT

II. THE PLAIN LANGUAGE AND CONGRESSIONAL INTENT OF THE ICWA MANDATES THE UNCONDITIONAL RIGHT OF TRIBES TO INTERVENE AND PARTICIPATE IN ICWA PROCEEDINGS

The Appellant argues that 25 U.S.C. § 1911 of the ICWA, which provides that an Indian child's tribe be permitted to intervene in an ICWA proceeding, preempts Neb. Rev. Stat. § 7-101 which prohibits the unauthorized practice of law. *Amici* concur with Appellant in this argument and rely on Appellant's preemption analysis, and set forth in more detail below why the language

of the ICWA secures the unconditional right of a tribe to intervene and participate in an ICWA proceeding by a representative of the tribe's choosing.

The plain language of the federal ICWA unconditionally mandates that an Indian child's tribe be permitted to intervene. 25 U.S.C. § 1911(c). It provides: "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the *Indian child's tribe* shall have a right to intervene at any point in the proceeding." *Id.* (emphasis added). In 1985, the Nebraska Legislature enacted the Nebraska Indian Child Welfare Act, Neb. Rev. Stat. §§ 43-1501–1516, with substantively similar provisions as the federal Act, including the right of the Indian child's tribe to intervene at any point in the proceeding. Neb. Rev. Stat. § 43-1504(3).

The plain language of 25 U.S.C. § 1911(c) and Neb. Rev. Stat. § 43-1504(3) is unambiguous. Generally, "statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous." *In re Interest of Walter W.*, 14 Neb. App. 891, 900, 719 N.W.2d 304, 311 (2006) (citing *State v. Switzer (In re J.K.)*, 265 Neb. 253, 656 N.W.2d 253 (2003)). Here, the statutory language setting forth the right of intervention under the federal or Nebraska ICWA is not predicated on the tribe obtaining legal representation. *See* 25 U.S.C. §§ 1911-1917; Neb. Rev. Stat. §§ 43-1501–1516. If Congress had intended to require tribes to retain legal counsel to intervene, Congress could have included qualifying language to that effect, but did not. *Id.*

Furthermore, the unconditional right of tribal intervention becomes even more apparent, not less, when considered with other provisions of the ICWA. Nebraska appellate courts have articulated that "[a] statute is ambiguous when the language used cannot be adequately

understood either from the plain meaning of the statute or when considered in pari materia with any related statutes." *In re Interest of Destiny A. et al.*, 274 Neb. 713, 720, 742 N.W.2d 758, 764 (2008) (citing *Zach v. Eacker*, 271 Neb. 868, 716 N.W.2d 437 (2006)). Here, however, the Act's jurisdictional, substantive and procedural requirements all guard Indian children against the permanent separation from their parents, families and tribes and improve the chances that Indian tribes will survive as viable sovereign, political entities. 25 U.S.C. §§ 1901–1963; *In re Interest of Enrique P.*, 14 Neb. App. 453, 463, 709 N.W.2d 676, 686 (2006) ("The Act is based on the assumption that protection of the Indian child's relationship to the tribe is in the child's best interest." (citing *Holyfield*, 490 U.S. at 50)). Specifically, in addition to provisions for intervention by tribes, the ICWA includes requirements for notice to tribes, higher standards of proof, and specific placement preferences, among other things. 25 U.S.C. §§ 1901–1963. Each of these provisions reflects the importance of maintaining a child's tribal and familial relationships.

In addition, the fact that federal law does not provide funding or other resources for legal representation for tribes to exercise the right to intervene and participate in ICWA proceedings, and could in fact be read to preclude the use of federal funds for this purpose, reinforces a plain reading of the statute as permitting a tribe to appear in ICWA proceedings through a non-attorney representative. *See State ex rel. Juvenile Dep't of Lane County v. Shuey*, 850 P.2d 378, 379 (Or. Ct. App. 1993) ("Although most tribes are entitled to and do receive federal grants for child and family services, those funds cannot be used for legal representation or legal fees for litigation. *See, e.g.*, 25 U.S.C. § 1931(a)(3); 25 C.F.R. §§ 89.40, 89.41. Other federal moneys for social services are similarly restricted: They cannot be used to pay for legal services for litigation. 25 U.S.C. §§ 450 *et seq.*").

However, even if the plain language of 25 U.S.C. § 1911(c) is read to be ambiguous, which it is not, the legislative history and purpose of the ICWA demonstrate that Congress intended through the ICWA to strengthen tribal sovereignty by involving tribes in ICWA proceedings, of which tribal intervention is a key tool. Generally, "[w]hen a statute is ambiguous and must be construed, the principal objective is to determine and give effect to the legislative intent of the enactment." *Premium Farms v. County of Holt*, 263 Neb. 416, 424, 640 N.W.2d 633, 640 (2002) (citations omitted). In addition, "[i]n construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it." *In re Interest of Walter W.*, 14 Neb. App. at 900, 719 N.W.2d at 311 (citing *State v. Lona F. (In re Joshua M.)*., 251 Neb. 614, 558 N.W.2d 548 (1997)).

The purpose behind the ICWA is clear. Congress expressly found the purpose of the ICWA to be: to protect and preserve tribes, to protect the Indian child as a vital resource to the existence and integrity of tribes, to prevent the breakup of Indian families and the placement of Native American children in non-Indian foster and adoptive placements, and to recognize the sovereignty of tribes. 25 U.S.C. § 1901. In addition, through the ICWA, Congress declared a policy "to promote the stability and security of Indian tribes and families," that is, a policy that would strengthen tribal self-government and improve tribal relations. 25 U.S.C. § 1902; *See also In re Interest of C.W.*, 239 Neb. 817, 825, 479 N.W.2d 105, 112 (1992) ("When Congress enacted the ICWA, it had two main goals: (1) protecting the best interests of the Indian children and (2) promoting the stability and security of Indian tribes and families."). Articulated another way, the United States Supreme Court quoted with approval language from a decision of the Utah Supreme Court which wrote: "The protection of [the tribe's ability to assert its interest in its

children] is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on parity with the interests of the parents." *Holyfield*, 490 U.S. at 53 (quoting *In re Halloway*, 732 P.2d 962, 969-70 (Utah 1986)).

The legislative history of ICWA also evinces a focus on tribal sovereignty. For example, in Congressional hearings prior to the enactment of the ICWA, "Indian tribal leaders pointed out that Indian tribes were recognized as [sic] by the United States as sovereign governmental units and as such final decision making powers in areas as basic as child welfare should rest within the realm of tribal jurisdiction." S. Rep. 95-597, at 7 (1997). In addition, as discussed above, the ICWA was enacted in response to the testimony and evidence regarding a "crisis . . . of massive proportions" involving high rates of removal of Indian children from their families, tribes and culture, and in response to concerns about the survival of Indian tribes as a result. H.R. Rep. No. 85-1386, at 9; *see also* S. Rep. 95-597 (1997). Again, the right of tribes to intervene and participate in ICWA proceedings is a primary method of addressing these issues.

Furthermore, the legislative history of the Nebraska ICWA in 1985 reveals that there was a general concern about the state's compliance with the federal ICWA, including a lack of compliance with timely notice provisions to allow tribes to intervene early on in proceedings, and a belief that in order to increase compliance, the federal act needed to be incorporated into state statute. *Nebraska Indian Child Welfare Act: Hearing on LB 255 Before the Committee on the Judiciary*, 89th Nebraska Legislature 90-114 (1985); *Nebraska Indian Child Welfare Act: Floor Debate on LB 225*, 89th Nebraska Legislature 1847-1848 (1985).

In addition to the plain language, clear Congressional intent, and legislative history of 25 U.S.C. § 1911(c), courts have uniformly held, and the Bureau of Indian Affairs (BIA) Guidelines stress, that the ICWA is a remedial statute and must be liberally construed to achieve its goals.

Holyfield, 490 U.S. at 52; *see also In re K.H.,* 981 P.2d 1190, 1196 (Mont. 1999) (recognizing remedial nature of ICWA); *In re Mellinger*, 672 A.2d 197, 197 (N.J. Super. Ct. App. Div. 1996) (same); *In re Angus*, 655 P.2d 208, 211 (Or. Ct. App. 1982), *cert. denied*, 464 U.S. 830 (1983) (same); Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67583, 67586 (Nov. 26, 1979); 3 Norman J. Singer, *Sutherland Statutory Construction,* § 60:1 (6th ed. 2001).

Furthermore, in interpreting federal Indian legislation, there are special Indian canons of construction that apply. These canons include: (1) the ICWA must be construed to prevent the abrogation of tribal self-government, *Washington v. Confederated Bands of the Yakima Indian Nation*, 439 U.S. 463, 484 (1979); *Bryan v. Itasca County*, 426 U.S. 373, 392-93 (1976); *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 174-75 (1973); (2) any doubts in or ambiguities in the ICWA must be resolved in favor of the Tribe, *Bryan, supra*, at 392; *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975); *McClanahan, supra*, at 174-76; and (3) the Act must be construed liberally toward carrying out its protective purposes. *Antoine, supra,* at 200; *Matt v. Arnett,* 412 U.S. 481, 504-05 (1973).

Applying these canons of construction to the right of tribes to intervene in ICWA proceedings supports a reading of 25 U.S.C. § 1911(c) as permitting a tribal representative to appear on behalf of a tribe. Specifically, if the Court finds 25 U.S.C. § 1911(c) to be ambiguous, it must resolve this ambiguity in favor of the tribe. In addition, the Act, including 25 U.S.C. § 1911(c), must be liberally construed to effectuate the protective purpose of recognizing tribal sovereignty and the interest of a tribe in its children. Burdening tribal intervention by requiring a tribe to retain an attorney to intervene would encumber the protective purposes of ICWA.

Thus, the right of a tribe to participate in an ICWA proceeding with an agent of its own choosing is a remedial tool to address the disproportionality of Indian children in the foster care system and to ensure Indian children have the involvement of their tribe in ICWA cases to protect their best interests. *In the Interest of N.N.E.*, 752 N.W. 2d 1, 17 (Iowa 2008) ("Tribal participation in state custody proceedings involving tribal children is essential to effecting the purpose of the ICWA." (citing *Shuey*, 850 P.2d at 381)); *In re Interest of Enrique P.*, 14 Neb. App. at 463, 709 N.W.2d at 686 ("The act is based on the assumption that protection of the Indian child's relationship to the tribe is in the child's best interests." (citing *Holyfield*, 490 U.S. at 50)). Additionally, on a practical level, intervention allows for tribes to participate in ICWA proceedings as a procedure "to educate state courts of tribal cultural and social standards, thereby, allowing a court to make a more informed decision and adhere to the spirit and intent of the act." Native American Rights Fund, *A Practical Guide to the Indian Child Welfare Act*, 47 (2007), *available at* http://www.narf.org/icwa.

The ICWA and its history show Congress' intent to protect the existence and integrity of tribes and to protect and foster the best interest of Indian children, which perpetuates the tribal relations of Indian peoples. It does so in the ICWA, which was reinforced by Nebraska in Neb. Rev. Stat. § 43-1504, by empowering tribes to intervene without having to obtain legal counsel. The County Court's failure to unconditionally grant Appellant's *Motion to Intervene* is inconsistent with the plain language of the ICWA (including the Nebraska ICWA) and the legislative intent of the law.

III. REQUIRING TRIBES TO BE REPRESENTED BY AN ATTORNEY TO INTERVENE OR PARTICIPATE IN STATE ICWA PROCEEDINGS WOULD HAVE A SIGNIFICANT, DETRIMENTAL EFFECT ON TRIBES, INCLUDING AN INFRINGEMENT ON TRIBAL SOVEREIGNTY AND A CONGRAVENTION OF THE ICWA

Conditioning tribal intervention or participation on the presence of legal counsel would greatly burden tribal rights under ICWA and in some cases would entirely deny the right of tribes to intervene under ICWA. For most tribes, tribal funds are scarce and it is questionable if tribes are even allowed to use federal child welfare funds to support legal representation for the tribe in child custody proceedings. 25 U.S.C. § 1931(a)(3); 25 C.F.R. §§ 89.40, 89.41. *See also In the Interest of N.N.E.*, 752 N.W.2d at18 ("Many tribes lack the resources for legal representation."); *Shuey*, 850 P.2d at 379 ("Although most tribes are entitled to and do receive federal grants for child and family services, those funds cannot be used for legal representation or legal fees for litigation. *See, e.g.,* 25 U.S.C. § 1931(a)(3); 25 C.F.R. §§ 89.40, 89.41. Other federal moneys for social services are similarly restricted: They cannot be used to pay for legal services for litigation. 25 U.S.C. §§ 450 *et seq.*").

If tribes were required to provide an attorney in every ICWA case it would have two serious results. First, it would require tribes to make very difficult decisions regarding the use of scarce available resources, such as providing services to all of their children and families versus not being able to provide services for their children and families because of the onerous burden of having to provide legal representation in court. Second, many Indian children would be without the expertise, resources and advocacy of their tribal government if a tribal representative were unable to represent the tribe. As a result, ICWA compliance would suffer as would the best interests of children. Such circumstances illustrate the burden that such a requirement would place on tribes. It would foreclose the opportunity for tribes to participate in many, if not all, of their ICWA cases.

Moreover, Indian children have a right to the protections of the law including advocacy of their tribe on their behalf. *State of Alaska, Dep't of Health & Soc. Servs. v. Native Village of*

Curyung, 151 P.3d 388 (Alaska 2006). If tribes were required to hire an attorney for every ICWA case, Indian children in many cases would be denied their right to have their tribes advocate for them.

For these and other reasons, the right of Indian tribes to participate in ICWA cases by a representative of their choosing has been widely recognized in courts across the country. It is a common and accepted practice nationally, including most Nebraska jurisdictions, for courts to permit tribes to exercise their right to file pleadings, intervene, appear and advocate in ICWA proceedings through representatives who are not attorneys. *See* B.J. Jones, Mark Tilden & Kelly Gaines-Stoner, *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children*, 89 (2nd ed. 2008) (published by the American Bar Association, Family Law Section) (stating that under the ICWA "there is no requirement that the intervention be sought by a licensed attorney representing the tribe" and "many times they [tribes] send social service representatives or even tribal judges to advocate the tribe's interests."); *Shuey*, 850 P.2d at 381 (noting that "tribes generally[ ] appear in child-custody proceedings in state court" through non-attorneys); SDCL 28-8A-33 (2005) (South Dakota Supreme Court Rule authorizing a tribe to appear by a non-attorney representative to intervene on behalf of the tribe in ICWA proceedings), *available at* http://www.sdjudicial.com/downloads/sc/rules/y2005/r0510.pdf.

In addition, Tribal social service workers, such as the ICWA Specialist who filed the *Motion to Intervene* in the present case, are authorized by tribal law to serve as the tribe's representative in ICWA proceedings. *See, e.g.*, Ponca Tribe of Neb. Code §§ 3-3-2, 3-3-5; Omaha Tribal Code §§ 12-3-3, 12-3-6; Resolution of the Santee Sioux Nation #2003-24. Therefore, when a state court denies a tribe the right to intervene through its tribal representative,

it essentially nullifies tribal law which amounts to an infringement of tribal sovereignty and an interference with federal policy embodied in the ICWA. *Cf. Fisher v. Dist. Court*, 424 U.S. 382 (1976). As a matter of law, the state does not have such authority. Indeed, as recognized by the U.S. Supreme Court, only Congress has "plenary and exclusive authority" over Indian affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004) (citations omitted); *See also, Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (noting that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"). The County Court's ruling in this case, therefore, amounts to a usurpation of that Congressional power.

Furthermore, Tribal social service workers are generally experienced in handling ICWA cases and are familiar with procedural and substantive requirements of the ICWA. *Shuey*, 850 P.2d at 381 ("The Grand Ronde [the tribe/proposed intervenor-appellant], and other tribes generally, appear in child custody proceedings in state court through its Director of Social Services, whose job includes overseeing child custody issues for tribal members. That necessarily requires intimate familiarity with the procedural and substantive requirements of the ICWA and with the procedures and organizations of other social services agencies."). In addition, the National Indian Child Welfare Association provides training, certification, and technical assistance to tribal social service representatives to help them comply with the ICWA and courtroom proceedings. National Indian Child Welfare Assoc., http://www.nicwa.org/training, http://www.nicwa.org/certification, http://www.nicwa.org/technical_assistance (last visited Mar. 17, 2009).

Finally, any burden on the right of tribes to intervene and participate in ICWA proceedings must be weighed against the interest of the state in requiring legal representation.

The state's interest in requiring organizations to be represented by an attorney, however, cannot compare to the interest of tribes in their children and in their survival, an interest which Congress unambiguously intended to safeguard through the ICWA. At the same time, Nebraska has recently increased its efforts to open access to the court system and to support pro se representation, including establishing self-help desks in several jurisdictions, providing certain forms and information for use by pro se litigants, and educating judges to manage cases involving self-represented litigants. *See* Honorable Richard D. Sievers and Honorable Teresa K. Luther, *Report of the Nebraska Supreme Court Committee on Pro Se Litigation* (November 22, 2002), *available at* http://www.supremecourt.ne.gov/community/adminreports/pro_sereport.pdf; *see also* Nebraska Judicial Branch, Self Help, http://www.supremecourt.ne.gov/self-help/ (last visited Mar. 17, 2009). This movement generally recognizes that the interest in judicial economy can and must be balanced in the interest of access to justice and open courts.

CONCLUSION

For all of the foregoing reasons, *amici curiae* respectfully requests that this Court reverse the County Court's order denying Appellant's intervention and filing of pleadings and order the County Court to grant Appellant's *Motion to Intervene* filed by Jill Holt and allow her to fully participate and file pleadings as the designated representative of the Ponca Tribe of Nebraska.

Dated this 26th day of March, 2009.

Respectfully submitted,

THE NATIONAL INDIAN CHILD WELFARE ASSOCIATION, THE OSAGE NATION, THE SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA, THE SPIRIT LAKE TRIBE OF NORTH DAKOTA, THE ROSEBUD SIOUX TRIBE, AND THE NEBRASKA ICWA COALITION, CONSISTING OF THE WINNEBAGO TRIBE OF NEBRASKA, THE

SANTEE SIOUX NATION, THE OMAHA TRIBE OF NEBRASKA, THE OGLALA SIOUX TRIBE, THE INDIAN CENTER, INC., THE NEBRASKA APPLESEED CENTER FOR LAW IN THE PUBLIC INTEREST AND LEGAL AID OF NEBRASKA.

NEBRASKA APPLESEED CENTER
FOR LAW IN THE PUBLIC INTEREST

By: ______________________
Sarah Helvey, #23410
LaShawn Young, #20900
941 "O" Street, Suite 920
Lincoln, NE 68508
shelvey@neappleseed.org
lyoung@neappleseed.org

Attorneys for Amicus Curiae
Nebraska Appleseed Center for
Law in the Public Interest

HEIDEMAN LAW FIRM, LLP
Rosalyn J. Koob, #22294
1128 Historic 4th Street
Sioux City, IA 51101
roz.koob@heidmanlaw.com

Attorney for Amicus Curiae
Winnebago Tribe of Nebraska

LEGAL AID OF NEBRASKA
Jennifer Gaughan, #21768
1904 Farnam Street, Suite 500
Omaha, NE 68102-1969
jgaughan@legalaidofnebraska.com

Attorney for Amicus Curiae
Legal Aid of Nebraska

NATIVE AMERICAN RIGHTS FUND
Mark C. Tilden, CO Bar #020005
admitted pro hac vice
1506 Broadway
Boulder, CO 80302-6296
mctilden@narf.org

Attorney for Amici Curiae
National Indian Child Welfare Association,
Indian Center, Inc., the Santee Sioux Nation,
the Oglala Sioux Tribe, the Osage Nation,
the Sac and Fox Tribe of the Mississippi in Iowa,
the Spirit Lake Tribe of North Dakota, and
the Rosebud Sioux Tribe

THOMPSON LAW OFFICE, LLC
Ben Thompson, #22025
2425 S. 144th Street, Suite 120
Omaha, NE 68144
ben@thompson.law.pro

Attorney for Amicus Curiae
Omaha Tribe of Nebraska

AFFIDAVIT OF SERVICE

STATE OF NEBRASKA)
) ss
COUNTY OF LANCASTER)

Sarah Helvey, being duly sworn on oath, states as follows:

1. that she is an attorney for the Nebraska Appleseed Center for Law in the Public Interest;
2. that on March 26th, 2009 she caused to be filed one original and 16 copies of the above and foregoing *Brief of Amici Curiae* with the Nebraska Supreme Court;
3. that on March 26th, 2009, she caused to be mailed two copies of the above and foregoing *Brief of Amici Curiae* to:

Brad S. Jolly, Attorney for Appellant
Smith & Jolly, LLC
11990 Grant Street, Suite 312
Denver, Colorado 80233

Sarah M. Meadows, Deputy County Attorney
Dakota County Attorney's Office
P.O. Box 117
Dakota City, NE 68731-0117

Barbara Kueny
John R. Begley, Guardian Ad Litem
300 South 19th Street, Suite 200
Omaha, NE 68102

Thomas A. Fitch, Attorney for Mother
P.O. Box 516
South Sioux City, NE 68776-0516

Douglas L. Roehrich, Attorney for Father
705 Douglas Street, #402
Sioux City, IA 51101

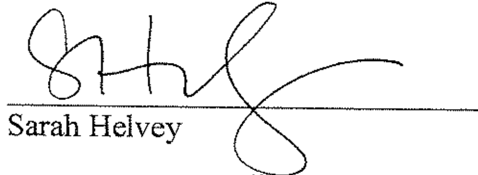
Karen C. Knight, Attorney
Nebraska Department of Health and Human Services
Operations, Legal and Regulatory Services
301 Centennial Mall South
P.O. Box 95026
Lincoln, NE 68509-5026

Jon Bruning, Attorney General
Office of the Attorney General of the State of Nebraska
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

by regular United States mail, postage prepaid.

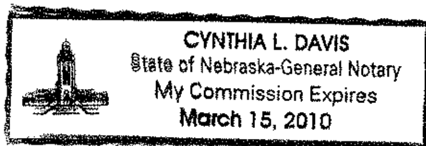
FURTHER AFFIANT SAITH NAUGHT.

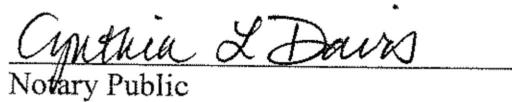
DATED this 26th day of March, 2009.



Sarah Helvey

SUBSCRIBED and SWORN before me this 26th day of March, 2009.





Notary Public